Supreme Court, U. S.
FILED
JUL 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1591

JOSEPH SAPIA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

PETER L. ZIMROTH
DAVID I. PINCUS
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Statement of the Case	2
Introduction	2
The Evidence at Trial	2
The People's Case	2
The Defendant's Case	4
Point I—A prosecutor does not have a constitutional duty to grant immunity to defense witnesses	5
Point II—Petitioner's other contentions are without merit and do not warrant review	12
Conclusion	16

TABLE OF AUTHORITIES

PAGE

Cases:

Cerda v. United States, 488 F.2d 720 (9th Cir. 1973) 8

Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967) 8, 8n

Hampton v. United States, 425 U.S. 484 (1976) 11

Massiah v. United States, 377 U.S. 201 (1964) 15

Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966) 8

Nigrone v. Murtagh, Matter of, 46 A.D.2d 343 (2d Dept. 1974), *aff'd on other grounds*, 36 N.Y.2d 421 (1975) 11

Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973) 14

Peters v. State, 233 N.W.2d 420 (Wisc. 1975) 8

Roznovsky v. Estelle, 546 F.2d 1185 (5th Cir. 1977) 13

Russell v. United States, 411 U.S. 423 (1973) 6n, 10, 11

Spano v. New York, 360 U.S. 315 (1959) 16

State v. Broady, 321 N.E. 2d 890 (Ohio App. 1974) 9n

State v. Shaw, 429 P.2d 667 (Ariz. 1967) 9

Terell v. United States, 294 A. 2d 860 (D.C. App. 1972) 9

United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir.), *cert denied*, 421 U.S. 999 (1975) 8

United States v. Bautista, 509 F.2d 675 (9th Cir.), *cert. denied sub nom.* Monsivais v. United States, 421 U.S. 976 (1975) 8

United States v. D'Angiolillo, 340 F.2d 453 (2d Cir.), *cert. denied*, 380 U.S. 1090 (1965) 12

PAGE

United States *ex rel.* Tatman v. Anderson, 391 F. Supp. 68 (D.Del. 1975) 8

United States v. Harris, 542 F.2d 1283 (7th Cir. 1976) 13

United States v. Jenkins, 470 F.2d 1061 (9th Cir.), *cert. denied*, 411 U.S. 920 (1972) 8

United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973) 13

United States v. Jones, 404 F. Supp. 529 (E.D. Pa. 1975) 8

United States v. Lacouture, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974) 13

United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968) 8

United States v. Martin, 526 F.2d 485 (10th Cir. 1975) 13

United States v. Morrison, 535 F.2d 223 (3d Cir. 1976) 9n

United States v. Olweiss, 138 F.2d 798 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944) 14

United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975) 8

United States v. Smith, 542 F.2d 711 (7th Cir. 1976) 8

United States v. Tatum, 496 F.2d 1282 (5th Cir. 1974) 12

Other Authorities:

C. McCormick, *Evidence* §246 (2d ed. 1972) 14

New York Criminal Procedure Law

§50.10 9

§50.30 ..... 7n

New York Penal Law

§220.35 2

§220.44 2

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1591

JOSEPH SAPIA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Court of Appeals of the State of New York unanimously affirmed the judgment in an opinion reported at 41 N.Y. 2d 160 (1976).

The Appellate Division of the Supreme Court of the State of New York, First Department, had previously affirmed the judgment (one judge dissenting) in an opinion reported at 48 A.D. 2d 524 (1st Dept. 1975).

STATEMENT OF THE CASE

Introduction

In two transactions, one on June 27 and another on July 6, 1973, petitioner sold nearly two and one-half pounds of heroin to an undercover officer for nearly $40,000. Petitioner was indicted and charged with criminally selling a dangerous drug in the first degree (New York Penal Law §220.44), and criminally selling a dangerous drug in the third degree (New York Penal Law §220.35). Petitioner went to trial in New York Supreme Court in front of Justice LEONARD SANDLER and a jury. The jury convicted petitioner on both counts. On November 14, 1974, petitioner was sentenced to terms of imprisonment of from 15 years to life, and from one to three years, to run concurrently.

The Evidence at Trial

The People's Case

On June 26, 1973, undercover Police Officer **Robert Hayward** went with confidential informant Earl Fodderell to the Bronx apartment of Robert Gardner to attempt to purchase narcotics (Hayward: 483-493).* After Fodderell introduced Officer Hayward to Gardner, Gardner said he could obtain an eighth of a kilogram of heroin for $4500 (Hayward: 496-497). Gardner said that his "man" would be there soon with the narcotics, but the "man" never showed up. Officer Hayward then left the apartment, saying that he would return the next evening (Hayward: 502).

---

* The page references are to the typed transcript of the trial.

Hayward returned with Fodderell on June 27 (Hayward: 506-507). Gardner said that the deal was set for $4700: $4500 would go to the "man" supplying the heroin, and $200 would go to Gardner as a "promoter's" fee. Officer Hayward gave Gardner the $4700, and Gardner left the apartment (Hayward: 511-513).

After a short time, Gardner returned to the apartment, followed moments later by his "man," petitioner Joseph Sapia (Hayward: 513-514). Sapia, holding a plastic bag of white powder, explained to the officer how to extract a test sample of heroin from the bag. He then handed the bag to the officer (Hayward: 514-519). The bag contained over four ounces of heroin (Argrett [chemist]: 1101-1104).

On July 3, 1973, Officer Hayward spoke by telephone with Sapia. Sapia agreed to sell Officer Hayward one kilogram of heroin for $34,500, and the deal was set for July 6 (Hayward: 560).

On July 6, Officer Hayward and Sapia met outside a Bronx bar. (Fodderell, the informant, was not present on this occasion.) Pursuant to Sapia's instructions, Officer Hayward drove alone to West 108th Street and Central Park West in Manhattan. There, Sapia got into the officer's car. The officer, in accordance with the plan, got out of the car, leaving the money ($34,500) with Sapia. Sapia then drove off (Hayward: 575).

Moments later, a youth who had been with Sapia approached Officer Hayward and directed him to where his car was now parked. Hayward got into the car. The money was gone, and in its place Hayward found two plastic bags

containing approximately a kilogram of heroin (Hayward: 577-578; Catalano [chemist]: 1161-1164).

Several weeks later, on August 16, 1973, Officer Hayward met Sapia by chance. Sapia indicated that he was interested in resuming their business relationship and that he again had substantial quantities of heroin to sell (Hayward: 621-623).

On September 20, 1973, Sapia and Gardner were arrested (Hayward: 597).

The Defendant's Case

The defense called as a witness **Mary Ann Bobick**, the wife and secretary of Sapia's chief trial counsel, Edward Bobick. Through her testimony, the defense sought to introduce into evidence an affidavit of Sapia and a tape recording of a conversation between Sapia and Mr. Bobick. (Both the affidavit and tape recording had been prepared on August 16, 1973, after the narcotics transactions but before Sapia's arrest.)

According to Sapia's affidavit, Fodderell had asked Sapia to obtain half of a kilogram of heroin. Sapia claimed he was afraid that Fodderell was going to "set him up * * * on a phony charge" (1379). In the tape recorded conversation, Sapia told his attorney that he had delivered narcotics for Fodderell to an individual named "Glen" (the undercover officer), but had only done so because Fodderell, who was about to go to prison, had offered to give Sapia his "Jersey [drug] contacts" and to let Sapia have "Glen" for Sapia's "own account" (1388).

The trial court, after extensive argument, ruled that the affidavit and tape recording were inadmissible because they were self-serving hearsay (1385-1438). The court also ordered the testimony of Mrs. Bobick (relating to the preparation and custody of the affidavit and recording) stricken in its entirety.

POINT I

A prosecutor does not have a constitutional duty to grant immunity to defense witnesses.

Following his rejection of the defense offer into evidence of the tape recording of the conversation between petitioner and his attorney, the trial judge suggested that the defense might wish to call the informant, Earl Fodderell, to give testimony relating to the defense contention that Fodderell had supplied the drugs that petitioner sold to Officer Hayward (1423). At first, the defense vehemently opposed the judge's suggestion. One of petitioner's attorneys stated that "there is no reason whatsoever in the world to think [Fodderell] would be in any way sympathetic" (1423). However, when the judge would not reconsider his ruling on admissibility of the defense tape recording, the defense decided to chance an interview with Fodderell (1479).

Fodderell was then imprisoned at the Federal House of Detention in Manhattan. He was serving a 12-year sentence on a narcotics-related conviction but had an application for resentencing pending because of his cooperation with the police (83, 1445, 1665-1666). After having spoken to Fodderell, the defense counsel requested that he be brought to court (1479, 1530). Fodderell appeared with his attorney.

Fodderell's attorney told the court that his client would assert his privilege against self-incrimination and refuse to answer all material questions unless granted immunity (1541). Fodderell's attorney also said that he would not permit the defense to see the sealed minutes of the sworn statement Fodderell had made in federal court concerning his cooperation in the Sapia case.

After an *in-camera* discussion with Fodderell's attorney outside the presence of the defense counsel and the prosecutor, the trial judge stated that the testimony that Fodderell would give under a grant of immunity would be exculpatory to some extent, if believed by the jury (1541-1542, 1570).* The trial judge also stated that that same testimony "undoubtedly would be incriminating as to Mr. Fodderell" (1575) and would describe activities which were outside the scope of his authority as an informant (1639).

The trial judge did not rest on the representations of Fodderell's attorney that Fodderell would invoke the Fifth Amendment. He also had Fodderell take the witness stand (outside the presence of the jury) and be sworn (1584). He asked Fodderell whether Fodderell would answer questions concerning his activities in the Sapia investigation (1585). At first, Fodderell was uncertain. He said, "I hope I'll be able to speak freely. I don't want to see an innocent man go to jail for something he's totally not responsible for. Then on the other hand, I don't want to incriminate myself. I don't want to be prosecuted because I'm doing enough

* The trial judge later stated that Fodderell's testimony would "have a bearing on" an entrapment defense (1681), and that "if believed, would not require the jury to acquit * * *, but that under a very plausible interpretation of the drift of the Supreme Court decision in the *Russell* case [*Russell* v. *United States*, 411 U.S. 423 (1973)], it might" (1742-1745).

time" (1585-1586). Then Fodderell decided that he would "go against [his] attorney's advice and answer the questions" (1588). Fodderell also said that he saw "no harm" in permitting the defense to see the minutes of his statement in federal court (1588-1599).

Petitioner's attorneys then discussed with Fodderell his proposed testimony, and reviewed the minutes of his prior sworn statement. When petitioner's attorneys learned that Fodderell's statement in federal court had been totally inconsistent with his proposed testimony (1593), they declined to call Fodderell immediately to the stand. Instead, they advised Fodderell that they did not "want him to lie and risk perjury" (1593) and suggested that Fodderell discuss the matter more fully with his own attorney (1595). Petitioner's attorney conceded that "this witness is not going to be effective for us * * * if he is going to be wholly inconsistent * * * and is going to be impeached by a prior sworn statement" (1594).

On the following day, Fodderell, having been advised by his counsel of the possible consequences of giving his proposed testimony, reconsidered his decision to testify on petitioner's behalf. He informed the trial judge that unless granted immunity from prosecution he would assert his privilege against self-incrimination (1636-1637). The prosecutor declined to request a grant of immunity for Fodderell,* and Fodderell was excused as a witness (1655).

* The New York statute on immunity grants states:

> In any criminal proceeding, other than a grand jury proceeding, the court is a competent authority to confer immunity * * * but only when expressly requested by the district attorney to do so [New York CPL §50.30].

Petitioner contends that the prosecution's failure to request immunity for Fodderell denied petitioner his right to due process of law.

We have found no case which has held that the prosecution has a constitutional duty to give immunity to defense witnesses. The leading case on the subject is *Earl* v. *United States*, 361 F.2d 531 (D.C. Cir. 1966) (BURGER, J.), *cert. denied*, 388 U.S. 921 (1967), which held to the contrary.*

Virtually every court which has considered the issue, has followed the holding of *Earl*. *See United States* v. *Smith*, 542 F.2d 711, 715 (7th Cir. 1976); *United States* v. *Bautista*, 509 F.2d 675, 677 (9th Cir.), *cert. denied sub nom. Monsivais* v. *United States*, 421 U.S. 976 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir.), *cert. denied*, 421 U.S. 999 (1975); *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); *Cerda* v. *United States*, 488 F.2d 720, 723 (9th Cir. 1973); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (9th Cir.), *cert. denied*, 411 U.S. 920 (1972); *United States* v. *Lyon*, 397 F.2d 505, 512-513 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968); *Morrison* v. *United States*, 365 F.2d 521, 523-524 (D.C. Cir. 1966); *United States* v. *Jones*, 404 F. Supp. 529, 538-540 (E.D. Pa. 1975); *United States ex rel. Tatman* v. *Anderson*, 391 F. Supp. 68 (D.Del. 1975); *Peters* v. *State*, 233 N.W.2d 420, 429-430 (Wisc.

* The *Earl* Court, in a footnote, left open the possibility that there would be a denial of due process where the prosecution sought immunity for one of its eyewitnesses while declining to seek immunity for an eyewitness for the defense. 361 F.2d at 534 n.2. That situation, of course, did not exist in the instant case.

1975); *Terell* v. *United States*, 294 A. 2d 860, 864 (D.C. App. 1972); *State* v. *Shaw*, 429 P.2d 667, 669 (Ariz. 1967).*

In any event, even if the Court should wish to review this generally accepted principle, this is not an appropriate case.

First, this case does not present the more usual situation where the prosecution is asked simply to grant a defense witness immunity from the use of his testimony. This case presents the more unusual, and more difficult case for a prosecutor. Under New York law, the prosecutor could not request mere use immunity. Only full transactional immunity could be granted, that is, immunity "for or on account of any transaction, matter, or thing concerning which [the witness] gave evidence. * * *" New York CPL §50.10(1).

Second, even if there might be cases in which it is legitimate to present a prosecutor with the choice of giving a defense witness transactional immunity or giving up the prosecution of the defendant, certainly a prosecutor should not be asked to make that choice without being allowed to know anything about what the defense witness will say. (What the defense witness says on the witness stand will define the scope of his transactional immunity.) In this case, neither the defense counsel, Fodderell's counsel, nor the trial judge would reveal the nature of Fodderell's testi-

* We have found only two cases in which the failure to grant immunity to a defense witness contributed toward reversal of a conviction. In one, the prosecutor intimidated a defense witness into asserting his privilege and then refused to grant immunity. *United States* v. *Morrison*, 535 F.2d 223 (3d Cir. 1976). In the other, an intermediate Ohio appellate court held that, under an Ohio statute, a court could grant immunity to a witness upon the request of a defendant. *State* v. *Broady*, 321 N.E. 2d 890 (Ohio App. 1974).

mony. Further, Fodderell was described as being one of the 100 top narcotics dealers in New York City (Bruno: 89). The prosecutor thus could not reasonably have consented to grant Fodderell full transactional immunity without any idea of how broad that immunity would be.

Finally, there is no reasonable likelihood that Fodderell's testimony would have exculpated petitioner. The trial judge and defense counsel said that Fodderell's testimony could be relevant to an "entrapment defense" (1680-1681). It is obvious that they were not talking about the usual variety of "entrapment defense," because that defense is not available to someone with a predisposition toward selling narcotics; it is clear from this record, and from the evidence that petitioner himself wanted to introduce, that petitioner had that predisposition.*

What the trial judge and defense counsel were talking about was the type of entrapment defense discussed in *dicta* in *Russell* v. *United States*, 411 U.S. 423, 431-432 (1973). That defense is that where an agent of the govern-

* Petitioner demonstrated his predisposition to sell drugs in several ways. Petitioner showed throughout his dealings with the undercover officer that he was a sophisticated narcotics "businessman" who wished to keep the officer as a steady customer (*see, e.g.*, trial record at 514-519). Further, when petitioner met the undercover officer by chance on August 16, 1974, petitioner again offered to sell large quantities of heroin to the officer (Hayward: 623). Moreover, the prosecution had evidence that petitioner had previously been found in possession of 686 glassine envelopes of heroin (1406-1407), further demonstrating petitioner's predisposition to sell narcotics. Finally, petitioner himself wished to introduce the tape recording of a conversation between petitioner and his attorney in which petitioner claimed that he delivered the drugs in order to get Fodderell's New Jersey drug "contacts" while Fodderell was in jail, and to get the undercover officer as a drug customer of petitioner's own. That conversation further demonstrates that petitioner was a narcotics "businessman" and not an "unwary innocent."

ment supplied the narcotics, then a due process violation is established as a matter of law, even if the defendent is predisposed to sell narcotics. In fact, the trial judge specifically referred to *Russell* in explaining why he thought Fodderell's testimony might be exculpatory. He stated that Fodderell's testimony, if believed, "might" require the jury to acquit "under a very plausible interpretation of the drift of the Supreme Court decision in the *Russell* case • • •" (1742-1745).

However, even if the jury had believed Fodderell's putative testimony that he had supplied the drugs to petitioner, it would not have exculpated petitioner. First, the doctrine that entrapment could be established even where the defendant was predisposed to commit the crime has never been the law of New York. *See, e.g., Matter of Nigrone* v. *Murtagh*, 46 A.D.2d 343, 350 (2d Dept. 1974), *aff'd on other grounds*, 36 N.Y.2d 421 (1975). Second, subsequent to the trial in the instant case, the doctrine that entrapment is established by the government's supplying of the drugs despite the defendant's predisposition to sell drugs was rejected by this Court in *Hampton* v. *United States*, 425 U.S. 484 (1976). Thus, it is clear that Fodderell's proposed testimony here was not exculpatory. Accordingly, this is not a good case for reviewing the general question of whether the prosecution may be required to grant immunity to defense witnesses.

POINT II

Petitioner's other contentions are without merit and do not warrant review.

1. Petitioner contends that the prosecution was required to call the informant, Fodderell, as its own witness.

However, as the cases make clear, the prosecution's obligations under the Confrontation Clause, the Compulsory Process Clause, and the Due Process Clause were met when the prosecution made Fodderell's identity known, and made him physically available to the defense. *United States* v. *Tatum*, 496 F.2d 1282, 1284 (5th Cir. 1974); *United States* v. *D'Angiolillo*, 340 F.2d 453, 455-456 (2d Cir.), *cert. denied*, 380 U.S. 1090 (1965). We are aware of no case in this or in any other court which requires more.

2. Petitioner contends that the trial court deprived him of his right to compulsory process to obtain witnesses in his favor when the court denied the defense request to have Fodderell invoke his Fifth Amendment privilege in the jury's presence.

The trial court had ascertained through an *in-camera* discussion with Fodderell's attorney that Fodderell's testimony would be self-incriminating. The defense attorneys (who had spoken to Fodderell) agreed with the trial court's assessment that Fodderell's testimony would be self-incriminating (1575), but nevertheless requested permission to call Fodderell as a witness and have him invoke his privilege in the jury's presence (1648-1651). The trial court noted the possible prejudicial effect of "very suggestive" questions followed by Fodderell's asserting his Fifth Amendment privilege, and denied the defense request (1652).

The assertion by a witness of his privilege against self-incrimination is not a matter for the jury's consideration. *United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975). Moreover, if asserted in the presence of the jury it is "likely to be regarded as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination." *United States* v. *Lacouture*, 495 F.2d 1237, 1240 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974). Consequently, it was well within the trial court's discretion not to allow the witness to be called to the witness stand to assert his privilege in the presence of the jury. *Roznovsky* v. *Estelle*, 546 F.2d 1185 (5th Cir. 1977); *United States* v. *Harris*, 542 F.2d 1283, 1297-1298 (7th Cir. 1976); *United States* v. *Martin*, *supra*; *United States* v. *Lacouture*, *supra*; *United States* v. *Johnson*, 488 F.2d 1206 (1st Cir. 1973).

In any event, the trial judge not only informed the jury that Fodderell had been called as a defense witness and had invoked the privilege (1659), but also allowed the defense counsel considerable latitude in summation to comment upon Fodderell's failure to testify (1764-1766). The trial judge thereby gave the petitioner the advantage of whatever probative value Fodderell's claim of privilege had.

3. Petitioner contends that the trial court denied him his right to compulsory process when the court excluded petitioner's pre-trial affidavit and tape recording from evidence.

The trial court ruled that the affidavit and tape recording should be excluded as self-serving hearsay. The court stated that they were "spurious" and appeared to have been "set up by Mr. Sapia for the purpose of creating a basis for a defense" (1434-1435). The affidavit and tape recording were offered for the truth of their contents, and were clearly hearsay. Moreover, petitioner has offered no exception to the hearsay rule under which they would have been admissible, even as a matter of state law. *See generally* C. McCormick, *Evidence* §246 (2d ed. 1972).

4. Petitioner contends that the trial court's ruling admitting into evidence statements of Gardner denied petitioner due process of law because there was no charge of conspiracy in the indictment.

Whether or not petitioner was charged with conspiracy in the indictment, Gardner was in fact petitioner's agent and co-conspirator. Gardner arranged the initial drug transaction on petitioner's behalf, and assisted petitioner in its execution. Accordingly, the statements in furtherance of the common scheme or plan were admissible against petitioner.

The admission of a co-conspirator's statement "does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against the principal." *United States* v. *Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944). *Accord, Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973). Consequently, the trial court's ruling was correct and does not raise a federal constitutional issue.

5. Petitioner contends that the prosecution's taking of a statement from petitioner outside his counsel's presence, and the prosecution's failure to disclose its contents to the defense, violated petitioner's right to counsel.

Following petitioner's indictment, and while he was free on bail, police officers involved in petitioner's arrest discussed with him the possibility of his assisting them in their investigation of other matters (892). At the beginning of this conversation, which was recorded, the police told petitioner that they did not wish to discuss the case pending against him (892). Although the police indicated that petitioner's cooperation might be helpful to him with respect to sentencing should he be convicted in the instant case, the facts of this case were not discussed. At trial, the judge heard the tape and verified that its contents had no relevance to the case on trial (893, 895, 1320). Also, the prosecutor indicated that he did not intend to offer the tape recording into evidence (893). Because of the confidential nature of the other investigations discussed by the police with petitioner, the prosecutor declined to permit the defense to hear the tape recording (893-894, 1320-1321).

In *Massiah* v. *United States*, 377 U.S. 201 (1964), relied upon by petitioner, this Court stated:

> We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statement, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution

as evidence against *him* at his trial. *Id.* at 207 (emphasis in original).

Because the purpose of the police here was to further their investigative efforts relating to crimes other than that with which petitioner was charged, because they did not obtain "a statement from defendant on which they could convict him," *Spano* v. *New York,* 360 U.S. 315, 324 (1959), and because the prosecution had no intention of using, and did not in fact use, the conversation (or any evidence derived from it) against petitioner at his trial, it is clear that petitioner's right to conusel was in no way abridged.

Conclusion

The petition for a writ of certiorari should be denied.

Rspectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

PETER L. ZIMROTH
DAVID I. PINCUS
Assistant District Attorneys
Of Counsel

July, 1977